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Using Public Disclosure as the Vesting Point for Moral Rights under the Visual Artists Rights Act

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NOTE

USING PUBLIC DISCLOSURE AS THE VESTING POINT FOR MORAL RIGHTS UNDER THE VISUAL ARTISTS RIGHTS ACT

*Elizabeth M. Bock**

In 2010, the Court of Appeals for the First Circuit confronted the novel question of when moral rights protections vest under the Visual Artists Rights Act. In Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, the First Circuit determined that the protections of the Visual Artists Rights Act begin when a work is “created” under the Copyright Act. This Note argues that this decision harms moral rights conceptually and is likely to result in unpredictable and inconsistent decisions. This Note proposes instead that these statutory protections should vest when an artist determines that his work is complete and presents it to the public. This standard is more consistent with the history of moral rights. Additionally, public access is necessary to justify a treatment of art different from that of other types of property, and it is a more essential component of moral rights than an artist’s feelings of connection to his work. Finally, the legislative intent behind the Visual Artists Rights Act and the reasoning in previous judicial decisions are more accurately reflected by a public disclosure standard. Utilizing “creation” as a vesting point for moral rights is not supported by the history of the Visual Artists Rights Act and will result in uncertainty and inconsistency in future decisions.

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INTRODUCTION

Port Morris, New York, is home to cranes, smokestacks, and, behind one chain-link fence, five massive steel plates that are waiting to be assembled into a Richard Serra sculpture.¹ The pieces have been sitting there for several years, waiting for their owner to call for their delivery.² In the meantime, people climb over the cardboard and shopping carts surrounding the work to place magnets on the steel or just to get a closer look at it.³ Mr. Serra's associates explained that the pieces "should not be considered a work of art at all, and certainly not a bona fide Serra sculpture. . . . [A] Serra is not a Serra until Mr. Serra says it is; this . . . is a big hunk of metal behind a chain-link fence."⁴ This strangely located sculpture raises the question of when a creation becomes a work of art.

This question was the central issue in the 2010 case *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*.⁵ In 2005, the Massachusetts Museum of Contemporary Art ("MASS MoCA") entered into an agreement with Christoph Büchel, a Swiss visual artist.⁶ Büchel was to construct a work entitled *Training Ground for Democracy* in the gallery space of the museum's Building 5.⁷ The relationship between the two parties deteriorated and Büchel ultimately abandoned work on the project.⁸ MASS MoCA attempted to show Büchel's unfinished work in an exhibit about how collaborative projects could go awry.⁹ The museum sued Büchel in order to obtain a declaration allowing it to display the work, and Büchel filed a counterclaim to stop the exhibition of his unfinished piece.¹⁰ The court was left with the question of when a work becomes art and therefore becomes eligible for protection under the federal Visual Artists Rights Act ("VARA").

Congress enacted VARA in 1990,¹¹ codifying a moral rights regime in the United States and granting visual artists rights apart from the economic

1. Sam Dolnick, *Richard Serra Sculpture Rusts in Bronx Yard*, N.Y. TIMES, Sept. 26, 2010, at MB1, available at <http://www.nytimes.com/2010/09/26/nyregion/26serra.html>. Richard Serra is an artist "famous for his massive steel sculptures." *Id.* His work was shown in a forty-year retrospective at the Museum of Modern Art in 2007. Randy Kennedy, *Sculpture (and Nerves) of Steel*, N.Y. TIMES, May 20, 2007, at A1, available at <http://www.nytimes.com/2007/05/20/arts/design/20kenn.html>.

2. Dolnick, *supra* note 1.

3. *Id.*

4. *Id.*

5. 593 F.3d 38, 42–43 (1st Cir. 2010).

6. *Büchel*, 593 F.3d at 42–43.

7. *Id.*

8. *Id.* at 44–46.

9. *Id.* at 45–46.

10. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 565 F. Supp. 2d 245, 247 (D. Mass. 2008).

11. Pub. L. No. 101-650, tit. VI, sec. 603(a), 104 Stat. 5089, 5128 (codified as amended at 17 U.S.C. § 106A (2006)).

ones provided by copyright.¹² VARA provides artists with three rights: attribution, integrity, and the ability to prevent destruction of works of recognized stature.¹³ The statute fails to identify when a work becomes eligible for VARA protection, leaving the court in *Büchel* with a novel problem. The district court found that VARA did not cover unfinished works and determined that MASS MoCA could display Büchel's work.¹⁴ On appeal, however, the First Circuit found that because VARA was part of the federal Copyright Act,¹⁵ the definitions of that statute controlled.¹⁶ Accordingly, the appellate court determined that since the Copyright Act "states that a work is created when it is fixed in a copy . . . for the first time" and that "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time," the work was sufficiently "created" when Büchel abandoned it.¹⁷ The appellate court therefore concluded that Büchel's unfinished sculpture was entitled to protection under VARA.¹⁸

This Note argues that VARA protection should not be extended to unfinished works and that the definition of "creation" utilized by the Copyright Act is not an appropriate standard for determining when works are eligible for coverage under VARA. Instead, works should be entitled to VARA protection when the artist presents his work to the public. Part I of this Note examines the history of moral rights and argues that public access to art has always been an essential component of moral rights. Part II explains that public access is more important to the framework of moral rights than the artist's individual connection to his work. Thus it is the public's connection to a work of art that justifies art being treated differently than other property, and without public presentation there is no reason for art to be given preferential treatment. Part III revisits *Büchel* and argues that the First Circuit's decision in that case harms moral rights both conceptually and in practice. The Part argues that disclosure, not creation, should be the moment when moral rights attach to a work of art. This standard is more consistent with the underlying structure of moral rights and the legislative history of VARA.

I. THE HISTORY OF MORAL RIGHTS

This Part examines the historical development of moral rights and argues that they were initially fueled by a desire to protect the moment of

12. See *infra* note 19.

13. See *infra* Part I.

14. *Büchel*, 565 F. Supp. 2d at 259–60.

15. 17 U.S.C. § 101 (2006).

16. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 51 (1st Cir. 2010).

17. *Id.* (ellipsis in original) (emphasis omitted) (quoting 17 U.S.C. § 101) (internal quotation marks omitted).

18. *Id.* at 56 (determining that the work "was 'fixed' within the meaning of the Copyright Act" and that Büchel thus "had rights in the work that were protected under VARA, notwithstanding its unfinished state").

public disclosure. VARA is based on the theory of moral rights,¹⁹ which was developed in the nineteenth century²⁰ and was first internationally codified in 1928 in the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).²¹ Moral rights theory developed as society began to view creative works as distinct from other property. The theory initially concerned the right of the artist to determine when his work could be viewed by the world. Moral rights then expanded to include other rights besides the ability of the author to decide when he had finished his work.

Scholars began to develop a theory of moral rights in the nineteenth century. They originally focused on whether third parties could force authors to disclose their unpublished works and whether the work could be modified without the author’s consent or published without his name attached.²² These three concerns manifested themselves in what came to be termed the rights of disclosure, integrity, and attribution. The right of disclosure allows an artist to determine when his work is complete and can be shown to the world.²³ The right of integrity gives the artist the right to prevent others from modifying his work without his permission.²⁴ Finally, the right of attribution—also known as the right of paternity or the right of authorship—gives the artist the right to have his name on his work and to prevent his name from appearing on something he did not create.²⁵ Prior to World War I, these rights manifested themselves in a variety of statutory provisions that varied by country and were not conceptually unified.²⁶

19. The term “moral rights” derives from the French “*droit moral*,” which is “a misnomer in the sense that moral rights are neither the opposite of immoral rights nor of legal rights.” Rather, they “are meant to be the opposite of economic rights.” Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 355 n.11 (2006).

20. Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 78 (2007) (noting that “many of the *decisional rules* currently associated with the moral rights doctrine were fully recognized in the early 19th century despite the fact . . . [that] the copyright concept of moral rights, was not developed in legal theory until much later”).

21. Convention of Berne for the Protection of Literary and Artistic Works, art. 6bis, 123 L.N.T.S. 233, Sept. 9, 1886, revised at Berlin, Nov. 13, 1908, and at Rome, June 2, 1928. The original Berne Convention was signed in 1886 in Switzerland. It followed the Paris Convention of 1883, which “created a framework for international protection for . . . [certain] kinds of intellectual property: patents, trademarks and industrial designs.” Eltjo J.H. Schrage, *The Payer Determines, or Does He?*, in ART & LAW 200, 207 (Bert Demarsin et al. eds., Alastair Weir trans., 2008).

22. Rigamonti, *supra* note 20, at 79.

23. Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 52–53 (1998).

24. *Id.* at 50; Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 217 (2010) (“The right of integrity protects the dignity and reputation of artists by prohibiting intentional or neglectful harm that leaves their physical works of art in a state that demeans their creators.”).

25. Liemer, *supra* note 23, at 47, 49.

26. For a discussion of the statutory approaches of different countries, see Rigamonti, *supra* note 20, at 89–92.

The evolution of moral rights—from a series of disconnected statutes, contractual provisions, and judicial decisions into a set of cohesive legal protections—occurred mainly as a result of theories articulated in Germany and France. Alfred Gierke developed the concept of *Persönlichkeitsrecht* (right of personality) in Germany,²⁷ while André Morillot advocated for *droit moral* in France.²⁸ In an 1872 article, Morillot argued that creditors could not force the publication of a work during the author's lifetime, saying that only rights which could be valued in terms of money could be claimed by creditors.²⁹ Morillot drew a distinction between moral and financial rights, and redefined the right of disclosure from one based on the idea that unpublished works didn't yet exist legally—and therefore couldn't be claimed by creditors—to one more concerned with the author's reputation and personal investment in the work.³⁰

Morillot, attempting to develop a complete theory of moral rights, expanded his theory to encompass the rights of integrity and attribution. He argued that all of these rights should be “under the umbrella of *droit moral*” because each made “reference to the unifying principle that the author's personhood . . . expressed in the work deserved respect.”³¹ Morillot's cohesive theory departed dramatically from the earlier understanding of moral rights as a “patchwork of . . . default rules in publishing agreements.”³² His theory was not justified by arguing that an unpublished work didn't legally exist, but by reference to the author's decision to share the work with the world.

Various European countries incorporated aspects of moral rights into their legal systems, and the addition of article 6bis added moral rights to the Berne Convention.³³ In 1928, the Italian administration placed moral rights on the agenda at the conference in Rome, and the Italian Copyright Act became the model for article 6bis of the Berne Convention.³⁴ However, the right of disclosure was dropped from the final text of article 6bis

27. 1 FRANKLIN FELDMAN ET AL., *ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS* 444–45 (1986).

28. Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 595 n.363 (2006).

29. Rigamonti, *supra* note 20, at 100–01; *see also* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 29 (1988) (noting that Morillot argued for “complete personal sovereignty which forbids all publication against the will of the author” (internal quotation marks omitted)).

30. Rigamonti, *supra* note 20, at 100–01.

31. *Id.* at 104 (internal quotation marks omitted).

32. *Id.*; *see also* MAREE SAINSBURY, *MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA* 5 (2003) (explaining moral rights prior to Morillot's writings); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 373 (1998) (explaining the shift in moral rights after Morillot's theory).

33. William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 507 (1955) (discussing the initial incorporation of article 6bis and its alterations over the years).

34. Rigamonti, *supra* note 20, at 113–16.

because of common-law countries' concerns that that right could not be reconciled with publishing agreements.³⁵ The theory articulated in the adoption of article 6bis was that moral rights were one half of the author's rights in his work, the other half being the right to reproduce the work and profit from it.³⁶ Article 6bis has gone through some modifications since its passage.³⁷ It currently states:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.³⁸

The article thus protects the rights of attribution and the right of integrity. Each country that signs onto the Berne Convention writes its own legislation governing these rights and can supplement them with additional rights.³⁹ France, for instance, also allows for the right of disclosure, the right of withdrawal (which allows an artist to demand the return of his work⁴⁰), and the right to make modifications to a work that has been withdrawn.⁴¹

35. See Cate Banks, *Lost in Translation: A History of Moral Rights in Australian Law 1928–2000*, 11 LEGAL HIST. 197, 202–03 (2007) (explaining common law opposition to moral rights and how compromises were made in order for article 6bis to pass); Rigamonti, *supra* note 20, at 117 n.242 (identifying common law countries at issue as the United Kingdom, Australia, New Zealand, the Irish Free State, Canada, and South Africa). See generally Rigamonti, *supra* note 20, at 117 (stating that common law countries find it “impossible to reconcile the author's right of disclosure with the binding force of publishing agreements when this right was declared inalienable in the sense that it would be available to authors regardless of any assignment of their patrimonial rights to the publishers”).

36. Rigamonti, *supra* note 20, at 109 (identifying Philipp Alfred as this view's lead proponent, arguing that moral rights and copyright were “the expression of a single principle . . . that the act of creating the work generates a relationship between the author and work that entitles the author to exclusive protection regardless of whether the author is motivated by patrimonial or personal interests”).

37. See generally Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 384–85 (1995) (detailing the alterations to article 6bis since its initial adoption).

38. Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, S. TREATY DOC. NO. 99-27, art. 6bis (1979) [hereinafter Berne Convention].

39. *Id.* at art. 6bis (3) (“The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.”).

40. Liemer, *supra* note 23, at 54.

41. Ruth Redmond-Cooper, *Moral Rights*, in DEAR IMAGES: ART, COPYRIGHT AND CULTURE 69, 71 (Daniel McClean & Karsten Schubert eds., 2002) (listing France's moral rights); *cf. id.* (discussing the United Kingdom's approach, which grants the right of attribution, the right of integrity, and the right to privacy for certain photographs and films); Schrage, *supra* note 21, at 208 (discussing the Belgian and German wordings, which paraphrase the Berne Convention's guarantees); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) (discussing the moral rights regimes of Italy, Germany, and France in comparison to the approach of the United States pre-VARA).

The United States signed onto the Berne Convention on March 1, 1989⁴² and passed VARA on December 1, 1990.⁴³ VARA protections are “narrowly define[d]”⁴⁴ and apply only to specific kinds of visual works.⁴⁵ Artists whose works meet the criteria of VARA are entitled to three types of protection. Consistent with the Berne Convention, VARA grants artists the right of attribution, allowing the artist to claim authorship of his work and to “prevent the use of his or her name as the author of any work of visual art which he or she did not create.”⁴⁶ It also grants the right of integrity, allowing the artist to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” along with the ability to prevent his or her name being attached to a work in such an event.⁴⁷ Additionally, for works of “recognized stature,” an artist may prevent “any intentional or grossly negligent destruction of that work.”⁴⁸ The United States did not incorporate the right of disclosure into its moral rights regime.

The House Committee Report on the passage of VARA justifies the addition of moral rights into American law in two ways. The first justification

42. *Berne Convention, Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited May 12, 2011); see also Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 124 (2006) (explaining that “[w]hen the [United States] became a party to the Berne Convention . . . it did not expressly recognize the moral rights required by Article 6bis” and that Congress justified this by stating that existing U.S. law, such as the Copyright Act and Lanham Act, effectively provided the rights of attribution and integrity).

43. Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106A (2006).

44. H.R. REP. NO. 101-514, at 10–11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6921.

45. VARA covers works of visual art. A work of visual art is:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 101 (2006). VARA protections apply regardless of whether the author is the copyright owner. *Id.* § 106A(b). They also apply regardless of whether the author currently owns the physical work. *Id.* § 106A(e)(2). VARA does not cover:

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container . . . (B) any work made for hire; or (C) any work not subject to copyright protection . . .

Id. § 101.

46. *Id.* § 106A(a)(1)(A)–(B).

47. *Id.* § 106A(a)(3)(A).

48. *Id.* § 106A(a)(3)(B).

is that the artist has a unique relationship to his work that is not captured solely by copyright and persists after the artist has sold his work.⁴⁹ The second is that art itself is different from other property because of its cultural importance and is therefore entitled to additional protections.⁵⁰ The former justification is the one most often referenced in discussions of VARA⁵¹ and in court opinions.⁵² It is therefore necessary to understand how this rationale is used and what is lost from the analysis by relying solely on this justification.

II. THE JUSTIFICATIONS FOR MORAL RIGHTS

The two justifications provided for the inclusion of moral rights in American law are that the artist has a relationship to his work that is worthy of protection and that art is culturally important and distinct from other property.⁵³ However, the majority of scholars discussing VARA assume that the primary purpose of moral rights is to protect the artist's relationship to his work.⁵⁴ This rationale partially justifies moral rights, but it is not the sole, nor the most crucial, driving force behind them. The public also has an interest in preserving works of art.⁵⁵ Section II.A argues that the focus by

49. See H.R. REP. NO. 101-514, at 5 (referencing the "arduous act of creation" artists engage in).

50. *Id.* at 6 ("Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. . . . [I]t is paramount to the integrity of our culture that we preserve the integrity of our artworks . . .").

51. See ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* xiv (2010) (comparing the relationship between an artist and his art to that of a parent and child); Redmond-Cooper, *supra* note 41, at 69 (noting that moral rights "take account of the intimate, emotional involvement between an artist and his or her creation").

52. *E.g.*, *Martin v. City of Indianapolis*, 192 F.3d 608, 611 (7th Cir. 1999) (noting that "[a]n artist's professional and personal identity is embodied in each work" and "[e]ach work is a form of personal expression" (citations omitted)); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (noting that "[t]he rights spring from a belief that an artist in the process of creation injects his spirit into the work").

53. See *supra* Part I.

54. See, *e.g.*, SIMON STOKES, *ART & COPYRIGHT* 65 (rev. ed. 2003) (claiming that moral rights are based in the idea that "any author, whatever he creates, embodies some part of himself in his works" and to "mistreat the work of art is to mistreat the artist"); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 497 (1991) (quoting JOHN HENRY MERRYMAN & ALBERT E. ELSER, *LAW, ETHICS AND THE VISUAL ARTS* 145 (2d ed. 1987)) ("The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality."); Cambra E. Stern, Comment, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 859 (2004) ("One of the fundamental bases for the concept of moral rights in general is the sanctity of the personality that the artist injects into the work that she creates.").

55. See *infra* Section II.B; see also W.R. Cornish, *Authors in Law*, 58 MOD. L. REV. 1, 9 (1995) ("[W]hat matters is not so much the claims of creative genius as the deep social, cultural response to [the] actual work.").

scholars and the courts on this justification is neither historically nor conceptually accurate. Section II.B then argues that it is necessary to refocus moral rights on the public's connection to artistic creations in order to produce more sensible outcomes under VARA.

A. The Connection of the Artist to His Work

The focus of moral rights scholars on the connection an artist feels to his work allows for easier theoretical attacks on moral rights. Scholars frequently argue that moral rights express ideals of nineteenth-century Romantic Era art production, such as the tragic artist pouring himself into his work.⁵⁶ They conclude that moral rights are outdated and irrelevant to society today.⁵⁷ In order to correct this misperception, it is necessary to develop a more accurate understanding of the artist's relationship to his work.

The personal relationship an artist has with his creation is better understood not as a reason to have moral rights, but as a defining feature of post-Renaissance art. The production of art in the contemporary sense began around 1400.⁵⁸ The definition of art changed over the centuries that followed, and the connection artists had to their work became increasingly important to that definition.⁵⁹ However, that connection did not necessarily

56. See, e.g., Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 271 (2009) (“[M]oral rights law is premised on a transitory, albeit deeply powerful notion of artistic authorship: the romantic myth of the solo genius artist.”).

57. E.g., *id.* at 265 (arguing that “moral rights law has become obsolete”). Additionally, it is worth noting that in contrast to the claims constantly made by moral rights scholars, Romantic artists were not melancholics who poured themselves into their work. Instead, they advocated an art that was not bound by rules and logic but was personal and expressive, with only the artist himself able to judge what made art good or successful. See HUGH HONOUR, *ROMANTICISM* 16 (1979) (stating that the Romantics “sought to express ideals which . . . lay beyond the bounds of logical discourse” with their “individual sensibility” being the “only faculty of aesthetic judgment”). This was comparable to the emphasis on style that accompanied the Renaissance, which was also a reaction to the rules-based notions of art production that had come before. See UMBERTO ECO, *ART AND BEAUTY IN THE MIDDLE AGES* 93 (Hugh Bredin trans., 1986) (explaining how Medieval art production was “not expression, but construction, an operation aiming at a certain result”).

58. See ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* 3 (1997) (arguing that prior to 1400 art was “not even thought of as . . . having been produced by artists,” as “the artist did not enter into the explanation of devotional images”); see also HANS BELTING, *LIKENESS AND PRESENCE: A HISTORY OF THE IMAGE BEFORE THE ERA OF ART* xxi–xxii (Edmund Jephcott trans., 1994) (arguing that after the Middle Ages art “became acknowledged for its own sake” and prior to that it “had a social and cultural significance of an altogether different kind”).

59. Through the Middle Ages, artists were seen either as craftsmen who copied nature or as actors inspired by divine forces. KWALL, *supra* note 51, at 1; see also DANTO, *supra* note 58, at 114 (noting that there was no “distinction . . . between art and craft”). In the Renaissance, artists were seen as separate from craftsmen, each artist creating works according to his own style. MOSHE BARASCH, *THEORIES OF ART: FROM PLATO TO WINCKELMANN* 178 (1985). This was the first time artists were seen as creative. See *id.* at 190. See generally ROBERT WILLIAMS, *ART, THEORY, AND CULTURE IN SIXTEENTH-CENTURY ITALY* 16–18 (1997) (discussing

mean that artists were creating the pieces themselves. Just as Büchel never constructed any piece of the work that MASS MoCA commissioned,⁶⁰ Renaissance artists produced art through large workshops, often adding only the finishing touches to the canvasses.⁶¹ An essential characteristic of art, then, is the intent to make a work of art, not to execute it oneself.⁶²

An examination of VARA reveals that the protections offered by moral rights in the United States are more focused on people who intend to make a work of art than on the connection creators feel to what they have made. For example, people who create works for hire may feel just as attached to their creations as any other artist, but their works are not protected.⁶³ VARA is drafted to protect pieces intended to be “pure” works of art. It does not cover advertisements, works for hire, and a wide variety of other creative endeavors.⁶⁴ These exclusions would not be logical if moral rights concerned only the connection of a creator to his work. Therefore, there is clearly a trait that art *as* art possesses that makes it worthy of receiving the extra protection of moral rights. This factor is the public’s interest in preserving its culture through preserving art.

B. The Necessity of Public Access for Moral Rights

The great unanswered question of modern art theory is what makes something a work of art.⁶⁵ Unsurprisingly, courts attempt to avoid decisions

Vasari’s concept of *disegno* (the term *disegno* literally means “drawing,” but is used to refer to an artist’s capacity to imagine an entire work of art)).

60. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 44–46 (1st Cir. 2010).

61. See, e.g., DAVID BLAYNEY BROWN, ROMANTICISM 10 (2001) (“[T]he Renaissance had incorporated a collective ideal . . .”); LARRY SHINER, THE INVENTION OF ART: A CULTURAL HISTORY 6 (2001) (noting that making art was usually a cooperative affair during this period, using Raphael’s frescoes as an example).

62. This is especially true post-Duchamp, when readymades and found objects (where the artist neither makes anything nor employs people to make anything, but finds an object and chooses to display it) are accepted as art. The act of deciding something is art, and not creation itself, is what matters. See, e.g., Steven Goldsmith, *The Readymades of Marcel Duchamp: The Ambiguities of an Aesthetic Revolution*, 42 J. AESTHETICS & ART CRITICISM 197, 197 (1983); Helen Molesworth, *Work Avoidance: The Everyday Life of Marcel Duchamp’s Readymades*, ART J., Winter 1998, at 50, 51–52.

63. 17 U.S.C. § 101 (2006) (noting that “[a] work of visual art does not include . . . any work made for hire” and that “[a] ‘work made for hire’ is—a work prepared by an employee within the scope of his or her employment” or a work made for specific purposes, like for a motion picture or as part of a collective work); see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85–88 (2d. Cir. 1995) (determining that the work in question was not eligible for VARA protection because it counted as a work for hire).

64. See *supra* note 45 and accompanying text.

65. See, e.g., Daniel McClean & Armen Avanesian, *Trials of the Title: The Trials of Brancusi and Veronese*, in THE TRIALS OF ART 37, 46 (Daniel McClean ed., 2007) (“What is art and what is not art is no longer obvious . . .”); HAROLD ROSENBERG, THE DE-DEFINITION OF ART 12 (2d prt. 1983) (“Painting, sculpture, drama, music, have been undergoing a process of de-definition. The nature of art has become uncertain.”). See generally PAUL CROWTHER, DEFINING ART, CREATING THE CANON: ARTISTIC VALUE IN AN ERA OF DOUBT

that require them to answer this question.⁶⁶ However, courts' reluctance to say *what* art is results in them forgetting *why* society cares about it. Society has an interest in protecting art and in treating it differently than other property, since art is valued culturally.⁶⁷ When moral rights are dismissed as simply concerning the artist's relationship with his work, this other rationale is forgotten. However, the authorship aspect of creative works is essential, for it is the public's relationship with art that justifies its protection. This Section explains the relevance of authorship to moral rights and argues that a work of art must therefore have a relationship to the public in order to receive the protection of moral rights.

At first, judges attempted to provide an objective answer to what made something a work of art. For example, in *Brancusi v. United States*, Brancusi fought a 40 percent import tax levied by U.S. Customs officials against his 1925 sculpture, *Bird in flight*.⁶⁸ The main issue of the case was whether the work counted as a sculpture—and was therefore exempted from the tax—under Article 1704 of the U.S. Tariff Act of 1922, or whether it instead counted as a utilitarian object.⁶⁹ The government was careful to argue that the case was not one about personal taste in art, and each side called experts to explain what made something a work of art.⁷⁰ The case has come to be

(2007) (attempting to define what art is now); DANTO, *supra* note 58 (discussing art after the "era of art"); STEPHEN DAVIES, *THE PHILOSOPHY OF ART* (2006) (discussing theories of how to define art and why people create it).

66. The courts instead tend to emphasize that they are avoiding issues of taste and look to technicalities to say something isn't art, such as the work's being made for hire or its use as an advertisement. *See infra* note 72. The focus is on defining art in terms of what it is not (the exclusions listed) as opposed to what it is. JESSICA L. DARRABY, 1 *ART, ARTIFACT, ARCHITECTURE AND MUSEUM LAW* § 9:9 (2010), available at ARTARCHLAW § 9.9 (Westlaw).

67. There are statutes outside of Title 17 that also articulate the value that art has to society. *See, e.g.*, National Foundation on the Arts and the Humanities, 20 U.S.C. § 951(3)–(6) (2006) ("An advanced civilization . . . must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future. . . . The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage . . .").

68. The 40 percent tax amounted to \$240. *Brancusi v. United States*, 54 Treas. Dec. Cust. 428 (Cust. Ct. 1928); *see also* McClean & Avanesian, *supra* note 65, at 38–39.

69. *See Brancusi*, 54 Treas. Dec. Cust. at 430–41. The U.S. Customs officials classified the work under "Kitchen Utensils and Hospital Supplied, one of the sub-categories of utilitarian artifacts listed under para. 399 of the Tariff Act (1922)." McClean & Avanesian, *supra* note 65, at 59 n.10. The Tariff Act defined paintings, sculptures, and statuary as:

Original paintings, in oil, mineral, water, or other colors, pastels, . . . original sculptures or statuary [in listed acceptable media] . . . but the terms "sculpture" and "statuary" as used in this paragraph shall be understood to include professional productions of sculptors only . . . and the words "painting" and "sculpture" and "statuary" as used in this paragraph shall not be understood to include any articles of utility, nor such as are made wholly or in part by stenciling or any other mechanical process.

Tariff Act of 1922 § 1704, 1 F. STAT. ANN. SUPP. 1922 (1923) (repealed 1930).

70. Thierry de Duve, *Bird, Fish or Flying Tiger: What's In a Name?*, in *THE TRIALS OF ART*, *supra* note 65, at 89, 89–90 (recounting that Brancusi's experts were a sculptor, the

viewed as a somewhat “comical” moment in legal history,⁷¹ and since *Brancusi*, courts have generally been deferential to the question of what makes something art. Instead, they tend to look to whether the work can be copyrighted or to other purposes of the work to decide whether VARA protections apply.⁷²

VARA, like the Tariff Act at issue in *Brancusi*, provides little guidance as to what specifically makes something a work of art.⁷³ However, the failure of the text of VARA and the courts to provide a definition of art has resulted in no acknowledgement that, fundamentally, all art is characterized by the relationship it has to the public.⁷⁴ It is not a coincidence that moral rights emerged conceptually at the same time that the importance of art to society was being articulated.⁷⁵ For instance, the nineteenth century gave rise to the idea that art’s cultural value meant that it was to be treated differently from other kinds of property.⁷⁶ Moral rights, which are the strongest in

director of the Brooklyn Museum, and three art critics while the United States called two professional sculptors).

71. The comedy arose from the long debate among the experts in the case over whether the title bore any relation to what the sculpture represented and from the government’s position that this lack of relation meant that the work was not a sculpture at all. See McClean & Avanessian, *supra* note 65, at 38.

72. See, e.g., *Kleinman v. City of San Marcos*, 597 F.3d 323, 329 (5th Cir. 2010) (determining that an art car was promotional and therefore not entitled to VARA protections); *Kelley v. Chi. Park Dist.*, No. 04-C-07715, 2008 WL 4449886, at *13–14 (N.D. Ill. Sept. 29, 2008) (determining that Kelley’s flower arrangements could be considered either a painting or a sculpture, but that they were not copyrightable and therefore not entitled to VARA protections), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011) (disagreeing with the thought that Kelley’s work counted as a painting or a sculpture at all and noting that “a living garden lacks the kind of authorship and stable fixation normally required to support copyright”).

73. The Committee Report on the enactment of VARA states:

The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.

H.R. REP. NO. 101-514, at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921; *accord* *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 531–32 (S.D.N.Y. 2001) (determining that even a clay model designed to become a larger sculpture can count as a visual artwork).

74. Many definitions of art, attempting to capture contemporary art, use the idea of a public unveiling as their sole criteria. See CROWTHER, *supra* note 65, at 21 (noting one definition of art as “an *evaluable* artifact of a kind created to be presented to an artworld public”).

75. Arguably this process began during the Renaissance, when treatises on art theory were first presented to the public; by the end of the sixteenth century, authors were aware that art was produced for a public that would interact with artists’ works as art in relation to other art. BARASCH, *supra* note 59, at 206; *see also* BELTING, *supra* note 58, at 471 (“[T]he new image required an understanding of art.”); *id.* at 552 (noting that in the Renaissance, “judgments on [art] passed to the art connoisseur”).

76. See Andrew Causey, *Eden v. Whistler: The Baronet and the Butterfly*, in *THE TRIALS OF ART*, *supra* note 65, at 151, 156 (“[T]here has been [since the nineteenth century] a

France, Germany, and Italy,⁷⁷ emerged while these countries “were placing a high value on the role of art within a distinct cultural identity.”⁷⁸ Underlying these rights is the idea that “[a]n artist’s work benefits a larger community” and that “[t]here is a public interest in preserving and protecting art works.”⁷⁹ As John Merryman eloquently pointed out in an article arguing for enactment of moral rights legislation pre-VARA:

[T]he interests of individual artists and viewers are only part of the story. Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture. We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.⁸⁰

The idea of art as part of a culture’s definition is neither novel nor outdated. For instance, in 1878, in a payment dispute about a painting (three years in the making) of a room commissioned for a family home in London,⁸¹ painter James McNeil Whistler declared “I do not acknowledge that a picture once bought belongs merely to the man who pays the money, but that it is really the property of the whole world.”⁸² More recently, in 1986, an Australian newspaper ran an advertisement for the sale of a Picasso painting.⁸³ The work, *Trois Femmes*, was to be cut up into 500 one-inch squares and sold square by square in individual frames.⁸⁴ This naturally “horrif[ie]d] the art world”⁸⁵ and violated a collective sense of what it meant to own a piece of art.⁸⁶ Even in the literary context, looking at a recent discussion of

widely held belief that . . . the principles underlying the ownership and exchange of art cannot be the same as those governing the exchange of manufactured goods.”).

77. Rikki Sapolich, *When Less Isn’t More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 IDEA 453, 455 (2007).

78. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 417 (2009).

79. Natalia Thurston, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 BERKELEY TECH. L.J. 701, 703 (2005).

80. Merryman, *supra* note 41, at 1041; *see also* Bird, *supra* note 78, at 426 (noting that moral rights “guard the non-morally embedded public interest in preserving artistic intention and cultural heritage”).

81. Causey, *supra* note 76, at 155–56.

82. STANLEY WEINTRAUB, *WHISTLER: A BIOGRAPHY* 185 (1974). Whistler similarly wrote on another occasion that “people imagine that just because they’ve paid £200 for a picture, it becomes their property. Absurd!” *Id.* at 407.

83. Bird, *supra* note 78, at 408.

84. *Id.*

85. *Id.* This was one of the events discussed when the United States enacted moral rights legislation, and Edward J. Markey of the House of Representatives mentioned it in his introduction of the proposed VARA in 1989. 135 CONG. REC. 12,622 (1989).

86. Private ownership of art is not seen as the right to treat works however one sees fit. *See, e.g.*, JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 68–72 (1999) (arguing that there are, in essence, two interests: that of the owner to do what he wishes with a painting, and that of the public at large in preserving the work for the future); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 791

the works of Kafka—whose works were published in spite of his orders that they all be burned at his death—one sees the argument that their publication was warranted because they “weren’t . . . Kafka’s private property but, rather, belonged to humanity[.]”⁸⁷

Art’s value to society has implications for its definition. If art is special and worth treating differently than other property, it is because of the unique meaning given to it by the public.⁸⁸ For the work to matter, there must, therefore, *be* a relationship between the work of art and the public.⁸⁹ There can be no cultural connection to art, no reason to treat it differently, if it is kept from public view. A work of art is “[p]roduced only where it is [c]ommunicated.”⁹⁰ It remains irrelevant whether the work was sent into society because the artist decided it was time or whether it only appeared on the public stage after the death of the artist, as in the case of Kafka. It matters only that there *is* a moment of public entry.⁹¹ However, as discussed in Part III, the courts, such as the First Circuit in *Büchel*, do not factor the interest of the public into their decisions involving moral rights.

III. VARA PROTECTIONS SHOULD VEST AT THE MOMENT OF PUBLIC DISCLOSURE

This Part argues that in order for VARA to properly reflect legislative intent and to remain consistent with prior judicial decisions, courts should recognize moral rights as vesting when an artist publicly discloses his work,

(2005) (“[A]n art collector does not exactly own a valuable painting that hangs in her living room. Rather, she is the work’s steward.”).

87. Elif Batuman, *Kafka’s Last Trial*, N.Y. TIMES, Sept. 26, 2010, at MM34, available at http://www.nytimes.com/2010/09/26/magazine/26kafka-t.html?_r=4&hpw.

88. The public also has a role in defining art in the first place. See DANTO, *supra* note 58, at 198 (“There is a difference . . . between the forms and the way we relate to them. . . . The way we relate to those forms is part of what defines our period.”); Rudi Laermans, *Deconstructing Individual Authorship: Artworks as Collective Products of Art Worlds*, in ART & LAW, *supra* note 21, at 50, 58–59 (“A work is never an artwork in itself, but is categorised or labelled as such in light of specific conventions or standards” that are determined by “a community . . . with a ‘collective consciousness’ or culture, a shared set of categories and definitions.” This “act of categorizing is by definition an interpretation . . .”).

89. This is a notion our culture understands. For example, the author of *The Hours*, Michael Cunningham, recently wrote in the *New York Times*:

I teach writing, and one of the first questions I ask my students every semester is, who are you writing for? The answer, 9 times out of 10, is that they write for themselves. I tell them that I understand—that I go home every night, make an elaborate cake and eat it all by myself. By which I mean that cakes, and books, are meant to be presented to others. And further, that books (unlike cakes) are deep, elaborate interactions between writers and readers, albeit separated by time and space.

Michael Cunningham, Op-Ed., *Found in Translation*, N.Y. TIMES, Oct. 3, 2010, at WK10.

90. Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-à-vis Patent and Trade-Mark*, 2008 MICH. ST. L. REV. 199, 203 (2008); *see also id.* at 200 (arguing that copyright generally is “less an exclusive right of reproduction than an exclusive right of public presentation”).

91. See *infra* Part III for a discussion on what counts as public disclosure.

not when the work is “created” under the Copyright Act. Courts can also reach more consistent and logically predictable results using disclosure as the vesting point for moral rights. Moreover, a disclosure standard recognizes that it is necessary for a work of art to be presented to the public in order for the work to be culturally relevant and therefore worthy of protections that are not given to other types of property. The artist should be entitled to decide when this moment of public disclosure is to occur. As Serra’s assistants explained, the pieces of steel sitting in Port Morris are not a work of art until Serra decides that they are.⁹² Serra’s decision, like any artist’s, is what allows his creation to be recognized as art; it is his choice alone to make.

This Part does not propose adding a right of disclosure, like the French moral rights system has.⁹³ Instead, it proposes that disclosure be used as the vesting point for the other moral rights in VARA.⁹⁴ This Part therefore uses the term “disclosure” to refer to the point at which VARA protections vest, not to signify an independent right under VARA. There are two ways for a work to be disclosed, only one of which allows for a claim under VARA.⁹⁵ First, an artist could make a conscious decision that his work was complete and display it to the public. In these cases, a standard comparable to the Copyright Act’s definition of “display” would be suitable. The Act states that displaying a work publicly is to “display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances [are] gathered.”⁹⁶ Second, an artist could die and the works could then be presented to the public. VARA protections last only for the life of the artist,⁹⁷ so any work he thought was incomplete could be shown to the public upon his death.

92. See *supra* note 4 and accompanying text.

93. See CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L. 121-2 (Pierre Sirinelli et al. eds., 9th ed. 2009) (Fr.) [hereinafter C. PROP. INT.].

94. The distinction between making disclosure the moment when VARA rights vest and adding disclosure as a right in itself is critical. To add a disclosure right is simply to give artists another right, but says nothing about the question at issue in this Note of when moral rights protections begin. Adding a disclosure right would also not change the outcome of *Büchel*, as Büchel would have claimed the right and prevailed over Mass MoCA.

95. Only the creator can bring suit under VARA, so there is no one who can bring a claim under VARA when a deceased artist’s works are presented to the public. 17 U.S.C. § 106A(b) (2006).

96. 17 U.S.C. § 101 (2006). For an example of a recent disclosure, see Jasper Rees, *Street Art Way Below the Street*, N.Y. TIMES, Oct. 31, 2010 (discussing an unused subway platform decorated by a series of graffiti artists and shown to a photographer and a reporter). These works of graffiti, however, would not be covered by VARA because they are placed illegally. See *English v. BFC & R E. 11th St. LLC*, No. 97-cv-7446(HB), 1997 WL 746444, at *5 (S.D.N.Y. Dec. 3, 1997).

97. 17 U.S.C. § 106A(d).

A. Disclosure Is Consistent with the Purpose and Text of VARA

This Section argues that utilizing disclosure as the vesting point for protection under VARA is sensible conceptually. First, it is consistent with the overall text of VARA and its stated interest in protecting the dignity of the artist. Second, it reflects the underlying interest of the public in preserving artworks. Third, it incorporates the legislative interest in preserving culture that motivated the passage of VARA.

VARA, which is framed in terms of the artist's rights in his work,⁹⁸ can easily accommodate disclosure conceptually. Integrity and attribution are concerned with the reputation of the artist, with a work "literally and figuratively" having "the artist's signature on it."⁹⁹ By "allowing artists to determine when a work . . . should be released to the public, [artists are given] full control over dissemination of their work" and, accordingly, their reputations.¹⁰⁰ Disclosure protects the dignity of the artist by respecting the "signature and presentation" of the author's choosing,¹⁰¹ and the right of the artist to disclose must be personal and discretionary.¹⁰²

The requirement of disclosure, however, adds more to VARA than another personal right—it more accurately reflects society's interest in art and the fact that art does not exist without a public. The "completion of [a] work involves some act of . . . public authorization"; art must be "perceptible."¹⁰³ The choice to disclose is personal, in that it is the artist's choice to do so (as with all other rights under VARA, where only the artist himself is entitled to

98. Cf. C. PROP. INT., *supra* note 93, at art. L. 121-3 (noting that the French right of disclosure, by contrast, can be exercised by the courts and the minister of culture in the case of "notorious abuses" ("*d'abus notoire*") in the exercise or nonexercise of the right by the artist or his descendants or heirs); SAX, *supra* note 86, at 26 (arguing that U.S. moral rights are "unmistakably focused on the rights of the artist").

99. Holst, *supra* note 42, at 114 (internal quotation marks omitted).

100. *Id.* at 113; see also Liemer, *supra* note 23, at 42-43 (discussing the vulnerability artists feel at the moment of disclosure and arguing that moral rights should protect artists from the harm of a forced exposure).

101. KWALL, *supra* note 51, at 5.

102. In this sense, the rule would resemble the French right of disclosure. C. PROP. INT., *supra* note 93, at art. L. 121-2. Similarly, an artist should be entitled to decide when to disclose his work regardless of whether "the work and all pecuniary rights in it are owned by the transferee." FELDMAN, *supra* note 27, at 454. This premise was tested in France by the case of *Whistler v. Eden*, where the court ruled that Whistler did not have to turn over a painting bought and paid for against his will, as discussed in Part II. For further analysis of the Whistler case, see *id.* at 451-52 and Causey, *supra* note 76, *passim*.

103. DAVIES, *supra* note 65, at 83; see also *supra* Section II.B.

bring an action¹⁰⁴). Still, the disclosure prong recognizes the relationship that art and artists have to the public.¹⁰⁵

The Committee Report on the enactment of VARA focuses on society's relationship to art as well, further supporting a disclosure standard. At VARA's passage, Robert Kastenmeier noted that while the first goal of VARA was to "protect the honor and reputation of visual artists," the second goal was "to protect the works of art themselves" because "society is the ultimate loser when these works are modified or destroyed."¹⁰⁶ Senator Kennedy argued that VARA was necessary to "safeguard the Nation's artistic heritage,"¹⁰⁷ and Senator Markey claimed that in order to "captur[e] the essence of [our] culture" it is necessary "to preserve the integrity of our artworks."¹⁰⁸ The Committee Report similarly states that the arts are "an integral element of our civilization;" they are "fundamental to our national character and are among the greatest of our national treasures."¹⁰⁹ It further argues that the public is "cheat[ed] . . . of an accurate account of the culture of our time" when works are altered or destroyed.¹¹⁰

B. Disclosure Avoids the Problems of a "Creation" Standard

A disclosure standard would resolve several problems that are created by the First Circuit's decision in *Büchel* to use "creation" as the standard for when VARA protections vest. As an initial point, this Section notes that there is no other case decided by the courts in which creation alone was sufficient for moral rights to apply. Next, this Section argues that a creation standard would oblige courts to apply one set of criteria to finished works and another to pieces in progress. Additionally, a creation standard makes it extremely difficult to determine when an integrity violation has actually

104. 17 U.S.C. § 106A(b), (e); cf. CAL. CIV. CODE § 987(g)(1) (West Supp. 2010) (extending the rights to the artist's heirs or personal representative for fifty years after the death of the artist); C. PROP. INT., *supra* note 93, at art. L. 121-2-3 (giving, in order, the creator's executors, descendants, spouse, heirs, and the minister of culture the right to enforce the moral rights).

105. This reincorporation of the public into intellectual property law is a growing trend, and recognizes that creative works are valuable because of the public's relationship to them. See, e.g., ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 1 (2010) (noting that copyright is concerned with balancing the access of authors to commercial benefits with the fact that literary works benefit the public); Drassinower, *supra* note 90, at 200 (criticizing the judiciary for their "infrequent" affirmation "of the centrality of users" in copyright cases); Jens Schovsbo, *How to Get it Copy-Right?*, in ART AND LAW: THE COPYRIGHT DEBATE 25, 29-30 (Morten Rosenmeier & Stina Teilmann eds., 2005) (arguing for users' rights to again be balanced with the rights of creators).

106. 136 CONG. REC. 12,608 (1990).

107. 135 CONG. REC. 12,250 (1989).

108. *Id.* at 12,622.

109. H.R. REP. NO. 101-514, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916-17.

110. *Id.* at 6.

occurred. Finally, the societal interests in preserving art do not apply to unfinished pieces that have yet to be presented to the public.

First, it is important to note that the act of “creation” has never been determinative in any other VARA case. Rather, that is only the starting point of the analysis. For instance, the unfinished work in *Carter v. Helmsley-Spear, Inc.* was “created” under the Copyright Act, but it was not covered by VARA because it was a work for hire.¹¹¹ Other works have been “created” but are unprotected by VARA because they were placed illegally¹¹² or used as advertisements.¹¹³ Artists who have challenged the destruction of their works must also present a case that their works possessed sufficient stature within the artistic community.¹¹⁴ It is not enough that their works were merely “created.” *Büchel* is the only case in which creation itself was sufficient for moral rights to apply.

Second, applying moral rights to works that are “created” but not yet disclosed creates a dual regime—an approach specifically rejected in the past—under which disclosed and undisclosed works have to be treated differently by the courts.¹¹⁵ A dual regime is created by the extension of VARA protection to unfinished works because what a work will be and what purpose it will serve cannot necessarily be determined when a work is incomplete. Courts will have no way of knowing with complete certainty what form the final creation will take, and could easily end up granting VARA protection to a work that, when completed, would not be entitled to it. A disclosure standard resolves this uncertainty by presenting courts only with completed works, at which point the decision as to whether the piece is a work of art or falls within one of VARA’s exceptions will be clear.

VARA is a limited statute, designed to apply only to works of visual art. It is not enough for a court to be able to decide that a work, when completed, will have some artistic value. For instance, artworks created as advertisements are excluded from VARA.¹¹⁶ As the Second Circuit pointed out in *Pollara v. Seymour*, such materials are excluded “regardless of whether . . . the work being used to promote or advertise might otherwise be

111. 71 F.3d 77, 86–87 (2d Cir. 1995).

112. *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, at *4 (S.D.N.Y. Dec. 3, 1997).

113. *Kleinman v. City of San Marcos*, 597 F.3d 323, 329 (5th Cir. 2010).

114. Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106A(a)(3)(B) (2006); see also, e.g., *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004) (determining that it is not enough for the artist to have recognition from the artistic community—the work in question must also have artistic recognition).

115. For example, in *Phillips v. Pembroke Real Estate, Inc.*, Phillips argued that a dual regime should exist under VARA, with one standard for site-specific art and another for all other works of visual art. 459 F.3d 128, 141–43 (1st Cir. 2006). The First Circuit rejected the proposed creation of two standards and also noted that Phillips’s proposal “could dramatically affect real property interests and laws.” *Id.* The extension of VARA protections to unfinished works both creates a dual regime and implicates property concerns similar to those presented in *Phillips*.

116. 17 U.S.C. § 101 (2006).

called a painting, drawing, or sculpture.”¹¹⁷ In other words, determining whether a work will be a painting, drawing, or sculpture upon its completion does not finish the inquiry. It is also necessary to look at what purpose the piece will serve, and a court cannot always accurately assess the ultimate purpose and function of unfinished works.

Similarly, in *Kleinman v. City of San Marcos*, the Fifth Circuit concluded that because the work of art at issue was made for primarily promotional purposes, VARA protections did not apply.¹¹⁸ The work in that case was a car that had been smashed and turned into a cactus planter.¹¹⁹ Had such a work been placed in a museum or gallery, it would easily have qualified as a sculpture. However, it was positioned outside of Kleinman’s store, and the court determined that it was an advertisement excluded from VARA protections.¹²⁰ The location and use of items are necessary elements in a court’s determination of whether they count as works of art under VARA. If the work was unfinished at the time of the suit, Kleinman could have claimed it was a work of art; there would have been no way to contradict her, as there would have been no method to ascertain the eventual purpose that the work would serve. This situation suggests the beginning of a dual regime in which a work that is unfinished receives more VARA protections because of the uncertainty concerning its ultimate purpose and location.

The difficulty that courts would face with such a standard is especially clear in the case of photography. In order for a photograph to be considered a work of visual art, it must be produced for exhibition purposes and must exist either as “a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”¹²¹ The purpose and the number of copies made and whether they are signed and numbered are all elements that can only be determined from completed photographs. A photograph can be “created” before it is numbered and signed and sent to a gallery, especially because negatives count as photographs for purposes of VARA.¹²² Courts would be left to assume the eventual purpose and the number of copies that will be made when dealing with negatives or photographs that are “created” but not yet disclosed. In fact, a recent case concerning whether photographs were produced for exhibition purposes specifically rejected using the intent of the artist at the time of “creation” to determine whether VARA protection applied.¹²³

Extending the protection of moral rights to unfinished works also raises the problem of determining when a violation under VARA has actually occurred. What does it mean to say that a change violated the integrity of a

117. 344 F.3d 265, 270 (2d Cir. 2003).

118. 597 F.3d at 329.

119. *Kleinman*, 597 F.3d at 324.

120. *Id.* at 329.

121. 17 U.S.C. § 101.

122. For a thorough discussion of why negatives count as photographs for moral rights purposes, see *Lilley v. Stout*, 384 F. Supp. 2d 83, 86 (D.D.C. 2005).

123. *Id.* at 87–89.

work when the piece is not yet complete and the change can be undone? For instance, in *Büchel*, the work was made by MASS MoCA under Büchel's instructions.¹²⁴ He never actually did any work of his own on the piece. The court found that the museum violated his integrity rights through their "encroach[ment] on his artistic vision by making modifications to the installation that in some instances were directly contrary to his instructions."¹²⁵ However, it appears from the record that many of those modifications could have been rectified.¹²⁶ In the case of collaborative works, it is likely that changes and modifications will be made throughout, for instance when the artist realizes that he has not adequately explained part of the work to the people actually making it. It is unclear from *Büchel* when rectifiable errors in construction would become integrity violations.

Finally, the application of VARA to unfinished works presents the risk of altering property norms, a concern raised by courts handling moral rights cases involving site-specific art.¹²⁷ Protections given to art already alter property norms, but society has decided that it is worth intruding on traditional notions of ownership in order to preserve culturally valuable art.¹²⁸ For example, a person can buy a table and cut it in half, but cannot do the same to a work of visual art because society as a whole suffers the loss and has decided that it is worth intruding on traditional property rights in the name of preservation. Unfinished works alter property rights, but without the justifications that accompany finished works. Society's interest in a work that has not been publicly disclosed is greatly reduced, if not nonexistent, and so it does not make sense to offer such works the same protections as disclosed works of art. Meanwhile, protecting unfinished works with moral rights has potentially dramatic consequences for property holders. There is nothing to stop an artist from doing minimal work on a project sufficient to meet the "creation" standard and then abandoning the work, leaving a gallery owner unsure if he can then make any alterations to the space. An artist could hold a museum or gallery hostage, demanding changes under the threat of suit, continually increasing the budget, as in *Büchel*, and holding up the space by refusing to move the work.

Therefore, it is much simpler to say that a work is not finished until it is disclosed, and until it is disclosed an artist cannot sue for VARA violations. No dual regime is thereby created, because the purpose of a work can be fully ascertained. Requiring artists to disclose their works also recognizes that the reason why art is valued is that the public has an interaction with it.

124. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 44 (1st Cir. 2010).

125. *Id.* at 57–61.

126. *See id.* at 45 (noting that, in fact, "numerous components of the installation [were] reworked to Büchel's specifications" when he visited the museum to check on the progress of the installation).

127. *See, e.g., Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 142 (1st Cir. 2006); *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011) (discussing *Phillips*).

128. *See supra* note 86.

A work should, of course, be entitled to copyright protections from the time it is “created,” but economic protections of copyright are not the same as the moral protections of VARA. As Serra wrote after the destruction of his work *Tilted Arc*,¹²⁹ moral rights “are independent from the work as property and . . . any pecuniary interest in the work” and acknowledge that “art can be something other than a mere commercial product.”¹³⁰ From the time moral rights were articulated, they have been seen as separate from an artist’s economic interest in his work.¹³¹ “Creation” is the appropriate standard for when economic rights should apply, but disclosure is a better standard for when moral rights should. Disclosure acknowledges that art is only valuable at the point when it becomes a work of art. Without a public there is no art.

CONCLUSION

There is no objective method for determining when a work of art is finished. Serra finished physically constructing his work, but claims it is not yet a work of art. Many of the great works in museums were considered incomplete by their creators and never meant to be shown to the world. While an artist is living, only he can decide when a work is complete and ready to be viewed by the public. The ability to decide when a work is viewable protects the reputation of the artist and gives him control over his works. The public also knows that they are seeing the work as the artist intended.

Büchel was incorrectly decided, because the work remained undisclosed at the time of trial. Therefore, Büchel should not have had any moral rights claims over his work. Using “creation” instead of disclosure as the vesting point for moral rights has the potential to create unmanageable and illogical results under VARA. Two standards would be created, one for finished works and one for unfinished works. The courts would be forced to speculate about the eventual purpose the work would be put to and, in particular, would run into problems with undisclosed photographs. Finally, it would be entirely unclear when an integrity violation actually took place. Instead of being subjected to such a dual standard, then, artists should be required to disclose their works to receive the protections of moral rights.

When an artist discloses a work of visual art, he is also identifying the work as a piece of art and presenting it to the public with that label. Only

129. See *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988); Christina Michalos, *Murdering Art: Destruction of Art Works and Artists’ Moral Rights*, in *THE TRIALS OF ART*, *supra* note 65, at 173, 179–82 (discussing Serra’s losing legal battle in 1986 to stop the removal of his site-specific piece *Tilted Arc* from the Federal Plaza in New York, where Serra argued that “[t]o remove the work would be to destroy the work”); see also Judith Bresler, *Serra v. USA and its Aftermath: Mandate for Moral Rights in America?*, in *THE TRIALS OF ART*, *supra* note 65, at 195, 195–200 (discussing the procedural history of Serra’s claim and how *Tilted Arc* was dismantled and put into storage fifteen days after the Berne Convention Implementation Act).

130. Richard Serra, *Art and Censorship*, 17 *CRITICAL INQUIRY* 574, 576 (1991).

131. See *supra* Part I.

when art is shown to the public does it becomes something more than a private and personal creation. Therefore, the point of disclosure is the appropriate time for a work to be covered by moral rights. Having moral rights vest at this time also more accurately reflects VARA's legislative intent, the history of moral rights, and the underlying societal interest in protecting art. Additionally, the courts can reach more logically coherent and predictable outcomes by utilizing a disclosure standard. Therefore, artists should be required to disclose their works in order to qualify for protection under VARA.